No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

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BRIEF FOR RESPONDENT

INTRODUCTION

This Court answered the question presented 34 years ago. It held that the Individuals with Disabilities Education Act (IDEA) does not contain "any substantive standard prescribing the level of education to be accorded" children with disabilities. *Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 189 (1982). It concluded that the Act instead contains a straightforward requirement: that the individualized education program (IEP) of personalized instruction and supportive services the statute mandates for each child be reasonably calculated to confer "some educational benefit." *Id.* at 200.

That decision was correct. Congress enacted the IDEA pursuant to the Spending Clause; as a condition of receiving federal funds, States are required to provide such services "as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26). Congress did not think any further substantive standard was necessary to ensure that children with disabilities get a quality education. Rather, it sought to achieve that ambitious aim principally through a comprehensive, finely reticulated scheme of procedural requirements and systemic policies. The Court cannot surprise participating States by superimposing on this scheme a substantive condition of which they had no notice.

Petitioner and the Government nonetheless ask this Court to fashion a sweeping new standard, advanced for the first time in their merits briefs in this case. But even they cannot agree what that standard should be: Petitioner contends (at 40) the Act requires that an IEP be designed to provide educational "opportunities" "substantially equal to the opportunities afforded children without disabilities," while the Government says (at 17) the Act mandates an IEP that provides "an opportunity to make significant progress." Petitioner's *amici* offer still other, conflicting tests. No State agreed to these requirements when it accepted IDEA funds, and the Court cannot adopt any of them without overruling *Rowley*. This Court should apply *stare decisis* and enforce the Act as written.

STATUTE INVOLVED

Key provisions of the IDEA are reprinted in the joint appendix. J.A. 21-111.

STATEMENT

A. Statutory Background

Congress enacted the IDEA pursuant to the Spending Clause. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 295 (2006). The Act offers States a deal: If a State "compli[es] with [the statute's] extensive goals and procedures," then it is entitled to receive "federal funds to assist * * * in educating children with disabilities." *Id.* (internal quotation marks omitted). To hold up its end of the bargain, a State must satisfy 25 express conditions. *See* 20 U.S.C. § 1412(a).

1. a. The Act's principal funding condition is the requirement that each participating State make available a "free appropriate public education," or FAPE, "to all children with disabilities residing in the State between the ages of 3 and 21." *Id.* § 1412(a)(1). The Act defines "free appropriate public education" to mean "special education and related services that" meet four specified requirements. *Id.* § 1401(9). "Special education" is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." *Id.* § 1401(29). And "related services" means "transportation, and such developmental, corrective, and other supportive services * * * as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26).

The Act also describes each of the four requirements a child's special education and related services must satisfy to constitute a FAPE. First, the education and services must be "provided at public expense, under public supervision and direction, and without charge." *Id.* § 1401(9)(A). Second, they must

"meet the standards of the State educational agency," *id.* § 1401(9)(B), meaning that States must, as a matter of federal law, abide by any educational requirements they have set for children with disabilities. Third, the education and services must "include an appropriate preschool, elementary school, or secondary school education in the State involved." *Id.* § 1401(9)(C). That means that children with disabilities must be schooled at "approximate[ly] the grade levels used in the State's regular education." *Rowley*, 458 U.S. at 176. Fourth, and most critically, a child's special education and related services must be "provided in conformity with the individualized education program," or IEP, "required under section 1414(d)." 20 U.S.C. § 1401(9)(D); *see id.* § 1412(a)(4).

The IEP is the "centerpiece" of the Act. *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). Schools must follow an "extensive" process in developing an IEP for each child with a disability. *Rowley*, 458 U.S. at 189. At the start, the school must "conduct a full and individual initial evaluation" of the child to determine the nature of his disability and any related needs. 20 U.S.C. § 1414(a)(1)(A); *see id.* §§ 1412(a)(7), 1414(b)-(c). The school must then assemble an "IEP Team" composed of the child's parents, his teachers, and educational experts, *id.* § 1414(d)(1)(B), to "consider" the results of the evaluation, "the strengths of the child," "the concerns of the parents," and the child's "academic, developmental, and functional needs," among other factors. *Id.* § 1414(d)(3)(A).

After conducting that review, the IEP Team must draft an IEP that satisfies a detailed checklist of requirements. The broad outlines of that checklist have remained roughly the same since 1975. *See Rowley*, 458 U.S. at 182 (quoting 20 U.S.C.

§ 1401(19) (1976 & Supp. IV)). Each IEP must contain a statement of the child's present levels of performance, his annual goals, and the educational services to be provided him, among other things. 20 U.S.C. § 1414(d)(1)(A)(i). Pursuant to the Act's "[l]east restrictive environment" requirement, the IEP must also ensure that, "[t]o the maximum extent appropriate," the child is "educated with children who are not disabled." *Id.* § 1412(a)(5)(A).

In 1997 and 2004, Congress added considerable detail to this checklist. *See* IDEA Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 614(d)(1)(A), 111 Stat. 37, 83-85; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 614(d)(1)(A), 118 Stat. 2647, 2707-2709. Today, in assessing the child's "present levels," the IEP Team must take into account his "academic achievement and functional performance." 20 U.S.C. § 1414(d)(1)(A)(i)(I). In setting the child's annual goals, the IEP Team must consider what would enable him to "be involved in and make progress in the general education curriculum" and "meet each of [his] other educational needs." *Id.* § 1414(d)(1)(A)(i)(II). And in developing the child's "special education and related services," the IEP Team must consider—"based on peer-reviewed research to the extent practicable"—what would allow him "to advance appropriately toward attaining the annual goals," "to be involved in and make progress in the general education curriculum," and "to be educated and participate with other children" in school activities. *Id.* § 1414(d)(1)(A)(i)(IV). Starting when a child is 16, his IEP must also contain "appropriate measurable postsecondary goals" and a statement of the "transition services

* * * needed to assist [him] in reaching" them. *Id.* § 1414(d)(1)(A)(i)(VIII).

If parents believe a school has failed to provide their child a FAPE, they may file a due process complaint with the state educational agency. *Id.* § 1415(b)(6). If the dispute cannot be resolved consensually, an impartial hearing officer conducts a hearing concerning the parent's claim; should the officer determine that the child was denied a FAPE, the officer may award a broad range of relief. *Id.* § 1415(f)(1), (f)(3)(E), (i)(2)(C)(iii); *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 244 n.11 (2009). Any "party aggrieved" by a hearing officer's decision may seek review in state or federal court. 20 U.S.C. § 1415(i)(2)(A).

b. This Court first considered the meaning of the Act's FAPE requirement in *Board of Education* v. *Rowley*. In that decision, the Court explained that a State's obligation to provide a FAPE is twofold. First, a State must "compl[y] with the *procedures* set forth in the Act," by following the detailed process the Act prescribes for developing an IEP. *Rowley*, 458 U.S. at 206-207 & n.27 (emphasis added). Second, the resulting IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207. The IEP, the Court explained, need not provide any particular "level of education." *Id.* at 189. So long as it is designed to provide "*some* educational benefit," the Act's substantive standard is satisfied. *Id.* at 200 (emphasis added).

2. In addition to the FAPE requirement, the Act contains an array of *systemic* conditions that States must satisfy to receive federal funds. For instance, each State must set a state-wide "goal of providing

full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal." 20 U.S.C. § 1412(a)(2). Each State must establish "goals for the performance of children with disabilities" that "are the same as the State's long-term goals" under the Elementary and Secondary Education Act of 1965 (ESEA). *Id.* § 1412(a)(15)(A). And each State must set adequate qualifications for special-education personnel, *id.* § 1412(a)(14), ensure access to instructional materials for the blind, *id.* § 1412(a)(23), and prohibit mandatory medication, *id.* § 1412(a)(25), among many other things.

The Department of Education polices States' efforts to satisfy these systemic requirements. Each State must submit a plan to the Department assuring that it "has in effect policies and procedures" to meet each condition. *Id.* § 1412(a). Pursuant to a 2004 amendment to the Act, States also must submit "performance plan[s]" setting "measurable and rigorous targets" for improvement and performance reports detailing their progress. *Id.* § 1416(b)(2)(A), (C)(ii). If the Department determines that a State is not "meet[ing] the requirements and purposes of [the Act]," the Department may order it to reallocate federal funds or impose other funding conditions. *Id.* § 1416(d)(2)(A)(i), (e)(1)-(2). If a State remains in continual noncompliance, the Department can cut off federal funds in whole or in part. *Id.* § 1416(e)(2)(B)(iii)-(v), (3)(B).

B. Procedural History

1. Petitioner Endrew F. ("Drew") is a child with a diagnosis of autism and attention deficit/hyperactivity disorder. Pet. App. 3a. These conditions affect

his "cognitive functioning, language and reading skills, and his social and adaptive abilities." *Id.* Drew attended schools in the Douglas County School District from preschool through the fourth grade, and received special education and related services under a series of IEPs. *Id.* at 3a-4a.

Drew's preschool and kindergarten years "went well," and he made academic progress through the first and second grades. *Id.* at 61a, 63a. In the second grade, however, Drew's "behavioral problems began increasing," leading his IEP Team to institute a behavioral intervention plan (BIP). *Id.* at 63a.

Drew's third-grade IEP nearly tripled the amount of time he spent either in a significant-support-needs classroom or with a paraprofessional aide to 33.5 hours total, and added the services of a mental-health professional and speech-language therapist. Supp. J.A. 39sa, 73sa. Although Drew "ma[de] progress towards some of [his] goals and objectives," his behavior "beg[a]n to interfere with [his] educational opportunities." Pet. App. 65a. Drew's fourth-grade IEP included a new BIP, designed to help him function better in his general-education classroom. Supp. J.A. 117sa-119sa.

Drew's IEP Team met again in April 2010 to design an IEP for the upcoming fifth-grade year. Pet. App. 67a. Drew's fifth-grade IEP called for more hours in the significant-support-needs classroom or with his paraprofessional aide. Supp. J.A. 109sa, 142sa. Because "[e]veryone" at the meeting agreed "that a new BIP was needed and that an autism specialist should be part of the team," the team agreed to reconvene on May 10, 2010. Pet. App. 68a. But Drew's parents never attended that meeting. In-

stead, on May 1, they notified the school district that they were enrolling Drew at Firefly Autism House, a private school specializing in educating children with autism. *Id.* at 29a, 68a-69a.

2. In February 2012, Drew's parents filed a due process complaint with the Colorado Department of Education seeking reimbursement for the cost of sending Drew to Firefly, where tuition approached $70,000 per year. J.A. 16-20; 2 C.A. App. 72; *see* 20 U.S.C. § 1412(a)(10)(C)(ii). They claimed that Drew had "stopped making progress in his first grade year," and that his fifth-grade IEP "was not substantively different than the IEPs that had failed to provide [him] an appropriate education in the past." J.A. 18-19.

After a three-day hearing featuring arguments from counsel for both sides and testimony from a number of witnesses, a state administrative law judge (ALJ) denied the parents' claims. Pet. App. 47a-49a, 59a-85a. The ALJ concluded that the fifth-grade IEP discharged the school district's obligation to provide a FAPE because the IEP was "reasonably calculated for [Drew] to receive educational benefit." *Id.* at 84a.

3. Drew's parents then filed suit in federal court challenging the ALJ's decision. *Id.* at 33a. After "independently review[ing]" the administrative record, the District Court upheld the ALJ's determination. *Id.* at 38a (internal quotation marks omitted); *see id.* at 41a-49a.

The Tenth Circuit affirmed. *Id.* at 2a. The court explained that it had "long subscribed to the *Rowley* Court's 'some educational benefit' language," which it interpreted to mean that a child's IEP must be

reasonably calculated to offer a "more than *de minimis*" educational benefit. *Id.* at 15a-16a (internal quotation marks omitted). The court noted that this determination must be made "as of the time [an IEP] is offered to the student"; "[n]either the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Id.* at 21a (internal quotation marks omitted). Applying that standard, the court concluded that "the IEP rejected by [Drew's] parents" was "substantively adequate," as demonstrated by Drew's "progress towards his academic and functional goals on his IEPs * * * during the time he was enrolled in the District." *Id.* at 22a-23a.

The Tenth Circuit denied rehearing en banc. *Id.* at 86a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. In *Rowley*, this Court held that States provide a "free appropriate public education" to children with disabilities when they offer special education and related services that are "reasonably calculated" to "confer some educational benefit." 458 U.S. at 200, 207. This Court should not abandon that interpretation in favor of alternatives *Rowley* itself rejected.

Rowley dismissed petitioner's "substantially equal opportunity" standard, Pet. Br. 50—lifted straight from Justice Blackmun's separate opinion—as "entirely unworkable" and inconsistent with congressional intent. 458 U.S. at 198; *see id.* at 210-211 (Blackmun, J., concurring in the judgment). And it foreclosed the Government's contention that the Act requires "an opportunity to make significant educational progress," U.S. Br. 6-7, by holding that the Act does not "prescrib[e] the level of education to be

accorded handicapped children." *Rowley*, 458 U.S. at 189 (majority opinion). The Court likewise declined to read the word "appropriate" to impose any substantive standard, concluding that the legislative history "unmistakably disclose[d]" that "an 'appropriate education' is provided when *personalized* educational services are provided"—nothing more. *Id.* at 197 (emphasis added).

The other side's efforts to recharacterize *Rowley* lack merit. No member of the Court thought *Rowley* left interpreting the Act's substantive standard for another day. Nor did anyone think the Court's isolated reference to providing "meaningful" "access" to public education tacitly reversed the Court's conclusion that the Act was not intended to "guarantee any particular level of education." *Id.* at 192. Rather, every Justice understood the Court to hold that access is meaningful where it is "sufficient to confer some educational benefit." *Id.* at 200; *see id.* at 214 (White, J., dissenting).

Stare decisis requires preserving *Rowley*'s decades-old construction of a Spending Clause statute—an interpretation Congress left untouched through two re-enactments of the Act and on which the States have justifiably relied.

II. If *stare decisis* did not decide this case, the statute's text and structure would. As legislation passed under the Spending Clause, the IDEA must set out its conditions "'unambiguously,'" placing state officials on "clear notice" of their obligations. *Arlington*, 548 U.S. at 296 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Yet petitioner and the Government cannot agree themselves on just what the Act requires. And their

attempt to ground their divergent standards in the word "appropriate" abandons the Act's own definitions in favor of tenuous inferences from broadly worded congressional findings. No reasonable state official reading what the statute actually says could be on "clear notice" of the standards petitioner and the Government would have this Court impose.

Rowley's "some educational benefit" standard, by contrast, is firmly rooted in the text and consistent with the IDEA's purposes. The statutory definition of a FAPE incorporates the requirement that a State provide "supportive services" that "assist a child * * * *to benefit from* special education." 20 U.S.C. § 1401(26) (emphasis added); *see id.* § 1401(9). Any state official would understand this language to require that IEPs be calculated to confer "some" benefit greater than *de minimis*. *Rowley*, 458 U.S. at 200-201.

Nor is that all the Act requires of participating States. Every IEP results from a statutorily mandated process designed to "maximize parental involvement" and ensure "individualized consideration of and instruction for each child." *Id.* at 182 & n.6, 189. And Congress has elaborated and refined the comprehensive list of items that process must address. 20 U.S.C. § 1414(d). Together, these requirements "assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206. And they are accompanied by ambitious state-wide goals, enforceable by the Department of Education through funding cutoffs. 20 U.S.C. § 1416(e)(2)-(3). No state official encountering these provisions could conclude that it was "perfectly fine to aim low." U.S. Br. 36.

III. The other side's protean proposals would strain the competence of courts. Petitioner calls for the same "impossible measurements and comparisons" *Rowley* warned would be "entirely unworkable." 458 U.S. at 198. And the Government articulates no principled distinction between what progress is "significant" and what is not. Neither petitioner nor the Government plausibly explains how courts could apply these standards without straying into educational policy disputes they "lack the specialized knowledge and experience necessary to resolve." *Id.* at 208 (internal quotation marks omitted). This is the case in point: Neither petitioner nor the Government says what, under their standards, petitioner's fifth-grade IEP ought to have said. And if they cannot say, it is hard to imagine how a court could.

The only workable standard is the one *Rowley* prescribes and that circuits have applied for decades. That test requires courts to ensure that a child's IEP is reasonably calculated to provide that child some benefit. These are the kinds of commonsense, record-based judgments courts are well equipped to make. The Court should not impose a different standard now.

ARGUMENT

I. *ROWLEY* DEFINITIVELY ANSWERED THE QUESTION PRESENTED

A. *Rowley* Adopted A "Some Educational Benefit" Standard

Petitioner asks this Court to decide what "level of educational benefit" an IEP must aim to provide to satisfy the IDEA's FAPE requirement. Pet. i. The Court answered that question 34 years ago in *Rowley*.

Rowley held that the IDEA does not impose "any substantive standard prescribing the level of education to be accorded" children with disabilities. 458 U.S. at 189. The Court explained that, as a Spending Clause statute, the Act could not "impose [a] burden upon the States unless it d[id] so unambiguously." *Id.* at 190 n.11; *see id.* at 204 n.26. Yet a "substantive standard prescribing the level of education" was "[n]oticeably absent from the language of the statute." *Id.* at 189. Rather, the "definitions contained in the Act" provided that "a 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Id.* at 188-189. And, "[a]lmost as a checklist for adequacy," the Act specified a series of additional requirements, including that the special education and related services be free, that they meet state standards, that they "approximate the grade levels used in the State's regular education," and that they "comport with the child's IEP." *Id.* at 189. "[T]he face of the statute" thus "evinces a congressional intent *** to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child." *Id.*

The legislative history merely "confirm[ed]" that Congress did not mean to "guarantee any particular level of education." *Id.* at 191-192. "Neither" of the two federal-court decisions that "became the basis of the Act" "purport[ed] to require any particular substantive level of education." *Id.* at 193-194 & n.15. And the Senate and House Reports made clear that "an 'appropriate education' is provided when person-

alized educational services are provided." *Id.* at 197. Although the Rowleys argued that "the goal of the Act is to provide each handicapped child with an equal educational opportunity," *id.* at 198, the Court explained that "Congress' desire to provide specialized educational services, even in furtherance of 'equality,' cannot be read as imposing any particular substantive educational standard upon the States." *Id.* at 200.

Still, the Court recognized that "the education to which access is provided" must "be sufficient to confer *some* educational benefit." *Id.* (emphasis added). After all, the statutory definition of a FAPE requires States to offer services sufficient to permit a child "*to benefit* from special education." *Id.* at 201. An IEP designed so that the child could "receive *no* benefit" would violate that textual command. *Id.* (emphasis added). So while an IEP need not promise any particular *level* of benefit, it must be "reasonably calculated" to provide *some* benefit, as opposed to *none*. *Id.* at 207.

The Court then turned to how the "some educational benefit" standard would be applied in individual cases. The Court recognized that "[t]he Act requires participating States to educate a wide spectrum of handicapped children," with vastly different needs and capabilities. *Id.* at 202. While "[o]ne child may have little difficulty competing successfully in an academic setting with nonhandicapped children," another "may encounter great difficulty in acquiring even the most basic of self-maintenance skills." *Id.* A program calculated to confer a benefit on one child might offer only a *de*

minimis benefit to another—and a *de minimis* benefit is no benefit at all.[1] The Court therefore did "not attempt * * * to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* Instead, it "confine[d]" its application of the standard to the case before it. *Id.*

The Court concluded by observing that the Act's "elaborate and highly specific procedural safeguards" "demonstrate[] the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 205-206. It cautioned judges not to "substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 206. Rather, in suits alleging the denial of a FAPE, a court was to proceed in two steps: "First, has the State complied with the procedures set forth in the Act," including "creat[ing] an IEP * * * which conforms with the [statutory] requirements"? *Id.* at 206 & n.27. And, second, is the

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[1] The vast majority of the federal courts of appeals over the last three decades have equated some benefit with a "more than *de minimis*" or "nontrivial" benefit. *See, e.g.*, *O.S.* v. *Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *D.B. ex rel. Elizabeth B.* v. *Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *K.E. ex rel. K.E.* v. *Indep. Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011); *P. ex rel. Mr. & Mrs. P.* v. *Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008); *Thompson R2-J Sch. Dist.* v. *Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008); *Todd* v. *Duneland Sch. Corp.*, 299 F.3d 899, 905 n.3 (7th Cir. 2002); *Cypress-Fairbanks Indep. Sch. Dist.* v. *Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997); *JSK ex rel. JK* v. *Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572-1573 (11th Cir. 1991).

resulting IEP "reasonably calculated to enable the child to receive educational benefits"? *Id.* at 207. If the answer to both questions is "yes," the State "has complied with the obligations imposed by Congress and the courts can require no more." *Id.*

B. Neither Petitioner's Nor The Government's Standard Can Be Reconciled With *Rowley*

Petitioner and the Government each ask this Court to supplant *Rowley*'s "some educational benefit" standard with a new substantive requirement, advanced for the first time in their merits-stage briefing. Adopting either standard would require overruling *Rowley*.

1. To begin, *Rowley* rejected the very arguments petitioner and the Government make here.

a. Petitioner contends that a FAPE means "an education that aims to provide a child with a disability opportunities * * * that are *substantially equal* to the opportunities afforded children without disabilities." Pet. Br. 40 (emphasis added). Petitioner appears to have lifted that standard straight from Justice Blackmun's separate opinion in *Rowley*. Breaking from his colleagues in the majority, Justice Blackmun argued that "the relevant question" was "not, as the Court says," whether a child's IEP is "reasonably calculated to enable [her] to receive educational benefits," but "[r]ather" whether it offers her "an opportunity to understand and participate in the classroom that [i]s *substantially equal* to that given her nonhandicapped classmates." 458 U.S. at 211 (Blackmun, J., concurring in the judgment) (emphasis added); *see also id.* at 215 (White, J., dissenting) (arguing similarly that children should

be "given an equal opportunity to learn if that is *reasonably possible*" (emphasis added)). There is a reason petitioner's test appears only in Justice Blackmun's opinion: It failed.

Indeed, the Court devoted an entire section of its opinion to rejecting any standard based on equality of opportunity. *See id.* at 198-200 (majority opinion). Requiring States to provide "'equal' educational opportunities," it said, would "present an entirely unworkable standard requiring impossible measurements and comparisons." *Id.* at 198. The very concept of a "free appropriate public education," the Court explained, is "too complex to be captured by the word 'equal' whether one is speaking of opportunities or services." *Id.* at 199. The Court therefore concluded that Congress's interest in "equality" could not "be read as imposing any particular substantive standard upon the States." *Id.* at 200.

Attempting to cast *Rowley* in a different light, petitioner (at 30) says the Court held only that the Act does not require "higher levels of achievement for children with disabilities than for children without disabilities." That is simply not true. What the Rowleys advocated—and what the Court categorically rejected—was any requirement that States "maximize the potential of each handicapped child *commensurate with the opportunity provided nonhandicapped children*." 458 U.S. at 200 (emphasis added); *see id.* at 189-190, 198; Resp. Br. 17, *Rowley*, *supra* (arguing that a FAPE is "an education that provides Amy Rowley with an equal educational opportunity," and that "the school district is not required to guarantee her any particular level of achievement").

And nothing in the Court's reasoning suggests—as petitioner would have it (at 42)—that *Rowley* forecloses only "*strict* equality of opportunity." The Court's reasoning makes clear that *Rowley* rejected *any* standard based on equality of opportunity. That is, after all, why Justice Blackmun could not join the Court's opinion, even though his test—like petitioner's—contained the qualifier "substantially."

b. For its part, the Government contends (at 17) that "an education is 'appropriate' when it provides the child with an opportunity to make significant progress in light of his capabilities." But *Rowley* could hardly have been clearer in explaining that the Act contains no "substantive standard prescribing the level of education to be accorded handicapped children," 458 U.S. at 189, and was not intended to "guarantee any particular level of education," *id.* at 192. *Rowley* thus forecloses any standard based on a particular level of progress.

c. *Rowley* also forecloses the textual basis on which the other side rests their standards. Both petitioner (at 16) and the Government (at 17) argue that the word "appropriate" in "free appropriate public education" should be read expansively in light of the IDEA's purposes to contain a broad substantive requirement. The Rowleys made virtually the same argument, down to citing the same dictionary definition of "appropriate" as "specially suitable." Resp. Br. 30, *Rowley*, *supra* (citing *Webster's*).

The Court flatly disagreed. It canvassed the legislative history and concluded that "Congress * * * equated an 'appropriate education' to the receipt of some *specialized* educational services." *Rowley*, 458 U.S. at 195 (emphasis added). That is, "an 'appro-

priate education' is provided when *personalized* educational services are provided." *Id.* at 197 (emphasis added). The Court thus declined to read "appropriate" in light of the Act's purposes, *see id.* at 190 n.11, or as "concisely express[ing]" the standard the Rowleys advocated, *id.* at 197 n.21.

2. The other side's attempts to find a foothold for their standards in *Rowley* are unavailing.

Petitioner (at 31-32) and the Government (at 13-14) claim that *Rowley* left the door open to their novel standards by refusing to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U.S. at 202. But the Court squarely rejected "any substantive standard prescribing the level of education to be accorded" children with disabilities; it did not leave that issue for another day. *Id.* at 189. Not even Justice Blackmun or the dissent thought the question remained open. *See id.* at 211 (Blackmun, J., concurring in the judgment); *id.* at 214 (White, J., dissenting). The Court's reluctance to "establish any one test" simply reflects the understanding that whether a child's IEP is reasonably calculated to confer a benefit will depend on individual circumstances—a proposition no one disputes. *See* Pet. Br. 48; U.S. Br. 25.

Nor is there any merit to petitioner's and the Government's reliance on *Rowley*'s unremarkable observation that advancing grade-to-grade can be "one important factor in determining educational benefit" where a child "is being educated in the regular classrooms of a public school system." 458 U.S. at 207 n.28; *see* Pet. Br. 30; U.S. Br. 14. In making that observation, *Rowley* meant merely to help courts

decide cases in which the "'mainstreaming' preference of the Act has been met": When "a child is being educated in the regular classrooms," the "grading and advancement system" can provide a simple answer to the otherwise "difficult problem" of measuring the benefit conferred by the child's IEP. 458 U.S. at 202-203. *Rowley*'s application of its "some educational benefit" standard to children who have been mainstreamed should not be mistaken for the standard itself.

Finally, petitioner (at 30-31) and the Government (at 14-16, 33) attempt to ground their standards in *Rowley*'s use of the word "meaningful." Their arguments rest on a single passage in the Court's opinion: "By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such *access* meaningful." 458 U.S. at 192 (emphasis added).

The other side fails to acknowledge that *Rowley* went on to explain exactly what "meaningful" "access" entails. *Id.* It held that the Act requires only "that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200. Or, in the dissent's paraphrase of the Court's holding: Amy Rowley "receiv[ed] a meaningful and therefore appropriate education" because she "was provided with *some* specialized instruction from which she obtained *some* benefit and because she passed from grade to grade." *Id.* at 214 (White, J., dissenting). The Court has since confirmed that reading, explicitly distinguishing "meaningful access to the public schools" from

"the level of education that a school must finance once access is attained." *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 79 (1999). That eviscerates petitioner's attempt (at 30) to link "meaningful" access to grade advancement. And it refutes the Government's contention (at 15) that "meaningful" access is "best read as another way of saying that States must give children the opportunity to make significant educational progress."

C. *Stare Decisis* Requires Adherence to *Rowley*

Although *Rowley* is controlling, neither petitioner nor the Government can bring themselves to ask this Court to overrule it. That would be a tall order. While "any departure from" *stare decisis* "demands special justification," four factors converge to endow *Rowley*'s holding with unusual durability. *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (internal quotation marks omitted).

First, *stare decisis* "carries enhanced force" in statutory interpretation cases. *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015); *see also Cedar Rapids*, 526 U.S. at 78 n.10 (applying heightened *stare decisis* to the Court's prior interpretation of the IDEA). That is because "Congress can correct any mistake it sees" in the Court's "interpretive decisions." *Kimble*, 135 S. Ct. at 2409. Congress has repeatedly done just that, swiftly amending the IDEA to correct interpretations with which it disagreed. *See* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, sec. 103, 104 Stat. 1103, 1106 (overturning *Dellmuth* v. *Muth*, 491 U.S. 223 (1989)); Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, secs. 2-3, 100

Stat. 796, 796-797 (overturning *Smith* v. *Robinson*, 468 U.S. 992 (1984)).

Second, *stare decisis* is all the stronger here because two Congresses have re-enacted the Act *without* altering the words construed in *Rowley*. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647; IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37; *Forest Grove*, 557 U.S. at 239-240 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (internal quotation marks omitted)). Though petitioner and the Government are correct that these amendments reflect Congress's desire to achieve better outcomes for children with disabilities, "Congress implemented [those] higher expectations in specific ways, and altering the standard for providing a FAPE was not one of them." *O.S.* v. *Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *see also Thompson R2-J Sch. Dist.* v. *Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1149 n.5 (10th Cir. 2008) (noting that "the same textual language" *Rowley* interpreted "has survived to today's version of IDEA"). States have thus continued to accept federal funds on the understanding that *Rowley* is good law. *See Forest Grove*, 557 U.S. at 246 (concluding that States were placed "on notice" of the meaning of an IDEA provision by a prior construction ratified by Congress). And "Congress's continual reworking of the [IDEA]"—but not of *Rowley*'s standard—"further supports leaving the decision in place." *Kimble*, 135 S. Ct. at 2410.

Third, "considerations favoring *stare decisis* are at their acme" in cases involving contract rights "be-

cause parties are especially likely to rely on such precedents when ordering their affairs." *Id.* (internal quotation marks omitted). Spending Clause legislation "is much in the nature of a contract." *Arlington*, 548 U.S. at 296 (internal quotation marks omitted). In exchange for federal funding, States have made numerous fixed investments in their education systems in reliance on the *Rowley* standard. Overruling *Rowley* would alter the terms of that decades-old bargain.

Fourth, the reliance interests at stake are not just any reliance interests; they are interests that implicate the division of federal-state power. Under our federal system, the "formulation and execution of educational policy" is a matter traditionally committed to the States. *Rowley*, 458 U.S. at 208 n.30. By subjecting some aspects of education policy to federal standards in exchange for funding, the IDEA shifts some of that power to the Federal Government. Revising the statute's core requirement would thus implicate the ordering of political as well as economic affairs.

Against this, petitioner and the Government offer little more than "retreads of assertions [this Court] rejected before." *Bay Mills*, 134 S. Ct. at 2037. "The [*Rowley*] majority did not find th[ese] argument[s] persuasive then," and petitioner and the Government give the Court "no new reason to endorse [them] now." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2409 (2014).

II. THE IDEA REQUIRES STATES TO PROVIDE "SOME EDUCATIONAL BENEFIT" TO CHILDREN WITH DISABILITIES

Rowley is not just controlling; it is also correct. The IDEA nowhere contains the standards petitioner and the Government propose, let alone puts any State on clear notice that they exist. By contrast, *Rowley*'s "some educational benefit" standard is a straightforward application of the Act's requirement that children receive the services they need "to benefit from special education," 20 U.S.C. § 1401(26), and it accords with both the Act's purpose and the comprehensive scheme Congress enacted to fulfill it.

A. The IDEA's Obligations Must Be Unambiguous

The proper starting point for determining what the Act requires is "the fact that Congress enacted the IDEA pursuant to the Spending Clause." *Arlington*, 548 U.S. at 295. As the Court has time and again explained, Spending Clause statutes are "much in the nature of a contract": In exchange for receiving federal funds, States must agree to be bound by the statute's conditions. *Id.* at 296 (quoting *Pennhurst*, 451 U.S. at 17). States cannot "knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.* Accordingly, Spending Clause statutes must set out their conditions "'unambiguously,'" placing state officials on "clear notice" regarding "the obligations that go with [federal] funds." *Id.* (quoting *Pennhurst*, 451 U.S. at 17); *see also, e.g., Davis Next Friend LaShonda D.* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

That clear-notice principle applies with full force to the IDEA. *See Forest Grove*, 557 U.S. at 246; *Winkelman ex rel. Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 533-534 (2007); *Rowley*, 458 U.S. at 190 n.11, 204 n.26. In *Arlington*, for example, the Court considered the scope of the IDEA's provision authorizing an award of "reasonable attorneys' fees as part of the costs" to prevailing parties. 20 U.S.C. § 1415(i)(3)(B)(i). In deciding whether that provision authorizes recovery of expert fees, the Court explained that the IDEA must be viewed from "the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds." *Arlington*, 548 U.S. at 296. Because the provision does not provide "clear notice" that expert fees are recoverable, *id.* at 298, the Court held that the Act does not impose an obligation on States to compensate prevailing parties for such expenses. *Id.* at 293-294; *see also FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (applying the sovereign-immunity canon to the scope of a statutory provision).

In fact, the Court has already applied the clear-notice rule to the very issue in this case: the meaning of a FAPE. *See Rowley*, 458 U.S. at 190 n.11, 204 n.26. As this Court has said, the FAPE requirement is the mandate "most fundamental to the Act." *Winkelman*, 550 U.S. at 530. It is the statute's "core requirement," U.S. Br. 1, governing "the educational programs IDEA directs school districts to provide." *Arlington*, 548 U.S. at 305 (Ginsburg, J., concurring in part and concurring in the judgment). There can be no doubt, then, that States would have considered the obligations imposed by this requirement critical when "deciding whether [to] accept IDEA funds." *Id.* at 296 (majority opinion); *see also id.* at 317

(Breyer, J., dissenting) (calling this "the basic objective of *Pennhurst*'s clear-statement requirement").

Remarkably, neither petitioner nor the Government even mentions the clear-notice rule, or attempts to argue that the statute unambiguously contains the standards they propose. Perhaps that is because petitioner and the Government cannot decide for themselves what the statute means. Between the certiorari stage and the merits stage, petitioner's proposed standard has transformed from "substantial educational benefit," Pet. 24, to "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society," Pet. Br. 14. The Government's standard, in turn, has shifted from "educational benefits that are meaningful in light of the child's potential and the IDEA's stated purposes," U.S. Cert. Br. 14, to "an opportunity to make significant educational progress, taking account of the child's unique circumstances," U.S. Br. 6-7. These shifting and inconsistent standards say it all. If even petitioner and the Government cannot figure out what the statute requires—or bring themselves to argue that the clear-notice rule is satisfied—then surely no State could be on "clear notice" of the standards they propose.

B. The IDEA Does Not Require States To Provide "Substantially Equal Educational Opportunity" Or "Significant Educational Progress"

1. A review of the statutory text confirms that the IDEA does not contain the other side's standards. Start by reading the statute as *Arlington* instructs: by "view[ing] [it] from the perspective of a state

official * * * deciding whether the State should accept IDEA funds," and "ask[ing] whether [that] official would clearly understand" that the statute establishes the obligations petitioner and the Government propose. 548 U.S. at 296.

Such an official would begin, naturally, by looking at the Act's 25 enumerated "conditions" for receiving federal funds. 20 U.S.C. § 1412(a). The first condition says that a participating State must make a "free appropriate public education available to all children with disabilities residing in the State between the ages of 3 and 21." *Id.* § 1412(a)(1). To understand what that requirement means, the official would turn to the applicable definition. It says that "[t]he term 'free appropriate public education' means special education and related services that" meet four enumerated requirements. *Id.* § 1401(9). So, the official would conclude, her State must provide "special education and related services" to each child with a disability. Nothing about "equal opportunity" or "significant progress" so far.

The conscientious official would then examine the definitions of each of those subsidiary terms. "The term 'special education' means specially designed instruction * * * to meet the unique needs of a child with a disability." *Id.* § 1401(29). "The term 'related services' means * * * such * * * supportive services * * * as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26). Plainly read, these provisions require States to provide "personalized instruction" to children with disabilities, along with services enabling those children to "benefit" from that instruction. *See Rowley*, 458 U.S. at 189, 197, 201, 203, 207 (adopting this reading). An official would clearly understand,

then, that her State must deliver personalized education that provides children with "some educational benefit." *Id.* at 200. But she would see nothing about the "level of education" those children must receive. *Id.* at 189.

The official would then consider each of the sub-requirements contained in the FAPE definition. A child's special education and related services must be free and publicly supervised. 20 U.S.C. § 1401(9)(A). They must meet state educational standards. *Id.* § 1401(9)(B). They must "include an appropriate preschool, elementary school, or secondary school education in the State involved," *id.* § 1401(9)(C)—that is, they must "approximate the grade levels used in the State's regular education." *Rowley*, 458 U.S. at 189, 203. And they must be "provided in conformity with the [IEP] required under section 1414(d)." 20 U.S.C. § 1401(9)(D). Section 1414(d), in turn, imposes a host of requirements regarding the content of an IEP. *See id.* § 1414(d)(1)(A)(i). But none of these provisions makes any mention of "equal opportunity" or "significant progress."

And that is the end of the FAPE definition. An official winding through each of its terms, sub-definitions, sub-requirements, and cross-references would thus find nothing "even hint[ing] that acceptance of IDEA funds makes a State responsible for" providing substantially equal educational opportunities or significant educational progress to children with disabilities. *Arlington*, 548 U.S. at 297. Such a "substantive standard" is simply "absent from the language of the statute." *Rowley*, 458 U.S. at 189. Under *Arlington* and *Pennhurst*, that is the end of the matter: Those requirements do not exist.

2. Petitioner and the Government nonetheless ask the Court to hold that, for decades, each State has "knowingly accept[ed]" federal funds on the understanding that it must satisfy the sweeping standards they propose. *Arlington*, 548 U.S. at 296. They say the States received notice of those requirements through a single word: "appropriate." Pet. Br. 16; U.S. Br. 16-17. That cannot be.

a. For starters, "appropriate" appears as part of a statutorily defined term: "free appropriate public education." And the Act's definition of that term lacks either of the meanings petitioner and the Government propose. Rather, the Act provides that "[t]he term 'free appropriate public education' means special education and related services that" meet four requirements. 20 U.S.C. § 1401(9). It is black-letter law that "[w]hen * * * a definitional section says that a word 'means' something, the clear import is that this is its *only* meaning"—in other words, the statutory definition "is virtually conclusive." Antonin Scalia & Bryan A. Garner, *Reading Law* 226, 228 (2012). Petitioner and the Government cannot substitute their preferred definition of a FAPE for the one the Act provides.

Perhaps recognizing this, petitioner (at 16) and the Government (at 17) suggest that the standards they propose can also be found in subparagraph (C) of the FAPE definition, which says that the special education and related services a State provides must "include an appropriate preschool, elementary school, or secondary school education in the State involved." 20 U.S.C. § 1401(9)(C). But *Rowley* already settled the meaning of this subparagraph, construing it to require that a child's education and services "approximate the grade levels used in the

State's regular education." 458 U.S. at 189; *see id.* at 203 (same). As the Court explained, Congress used the word "appropriate" in this provision to convey that States must place children in a "suitable" educational "setting[]," not as "a term of art which concisely expresses" the sorts of standards petitioner and the Government suggest. *Id.* at 198 n.21. Two Congresses have re-enacted the statute against the backdrop of that construction, and States have for decades accepted federal funds on that understanding. *See supra* pp. 23-24. The Court cannot revisit it now.

b. The other side's problems do not end there. Even if it were *possible* to infer a substantive standard from the word "appropriate," the word surely does not "unambiguously" impose any such standard. "Appropriate" is the very paragon of ambiguity, and in case after case, the Court has said that it lacks the clarity necessary to overcome *Pennhurst* and similar clear-statement rules.

Pennhurst itself said as much. That case concerned a provision of a Spending Clause enactment stating that persons with disabilities have "a right to appropriate treatment, services, and habilitation" in state facilities. 451 U.S. at 13. Much as in this case, the Government argued that the words "appropriate treatment" obligated participating States to provide a certain "adequate" level of services to persons with disabilities. *Id.* at 7-9, 22. The Court disagreed. The clear-statement principle "applies with greatest force," it said, "where, as here, a State's potential obligations under the Act are largely indeterminate." *Id.* at 24. Because "[i]t is difficult to know what is meant by providing 'appropriate treatment,'" the Court continued, "it strains credulity to argue that

participating States should have known of the[] 'obligations'" the Government described. *Id.* at 24-25. This provision thus "fell well short" of providing the "clear notice" the Spending Clause requires. *Id.* at 25.

The Court has reached similar conclusions in applying other clear-statement principles. In *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983), the Court held that a statute authorizing courts to award "costs of litigation * * * whenever * * * appropriate" did not furnish the "clear showing" necessary to abrogate the American Rule or waive sovereign immunity, because "[i]t is difficult to draw any meaningful guidance from * * * the word 'appropriate.'" *Id.* at 682-685 (emphasis omitted). In *Sossamon* v. *Texas*, 563 U.S. 277 (2011), the Court held that the phrase "appropriate relief against a government" did not "unequivocally" waive States' sovereign immunity, because "'[a]ppropriate relief' is open-ended and ambiguous about what types of relief it includes," and "susceptible of multiple plausible interpretations." *Id.* at 285-288.

What was true in *Pennhurst*, *Ruckelshaus*, and *Sossamon* is also true here: The word "appropriate" cannot overcome the clear-notice rule. The Court therefore cannot, as petitioner and the Government suggest, construct a meaning for "appropriate" by freely consulting "context," U.S. Br. 17, and "other sources," Pet. Br. 19. In *Sossamon*, the only "context" that mattered was that "the defendant [was] a sovereign." 563 U.S. at 286. In *Ruckelshaus*, the "other sources" the Court examined were the rules requiring a clear statement shifting fees or waiving sovereign immunity. 463 U.S. at 683-686. Here, the

"context" is that the IDEA is a contract with the States; the Court should look no further.

Forest Grove and *West* v. *Gibson*, 527 U.S. 212 (1999), only reinforce the point. In *Forest Grove*, the Court held that the IDEA provision authorizing "such relief as [a] court determines is appropriate" permits reimbursement of the costs of private-school tuition. 557 U.S. at 232-233, 237-238, 246 (quoting 20 U.S.C. § 1415(i)(2)(C)(iii)). The Court said States were "on notice" of that requirement for two reasons: first, because reimbursement awards merely require States to "'belatedly pay expenses'" that they "expressly agree[d]" to pay when they signed up for the Act; and second, because the Court had previously issued the same interpretation and Congress had ratified it. *Id.* at 246 (quoting *Sch. Comm. of Burlington* v. *Dep't of Educ.*, 471 U.S. 359, 370-371 (1985)).[2] *West* similarly concluded that the term "appropriate remedies" in Title VII unambiguously authorizes damages awards against the Federal Government because a separate provision "*explicitly* allow[s] damages in actions under Title VII." *Sossamon*, 563 U.S. at 286 (emphasis added) (describing *West*, 527 U.S. at 217-218, 222); *see also West*, 527 U.S. at 224 (Kennedy, J., dissenting) (contending that even this evidence was insufficiently clear). None of these considerations is present here: The other side identifies no "express" or "explicit" lan-

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[2] The Court's prior decision, *Burlington*, did not discuss the Spending Clause clear-statement rule, likely because no party mentioned it. *See, e.g.*, Pet. Br., *Burlington*, *supra*, 1985 WL 669932. The Court has since made clear that "*Pennhurst*'s notice requirement" applies to the Act's remedial provisions. *Forest Grove*, 557 U.S. at 246; *see Arlington*, 548 U.S. at 296.

guage imposing the requirements they advocate, and the history of congressional ratification cuts decisively against them. *See supra* pp. 23-24.

c. Nor is that the last of the other side's problems. Even if one thought that "appropriate" was not limited to the statutory definition of a FAPE, and also that it unambiguously imposed some type of substantive standard on States, petitioner and the Government could *still* not prevail unless the statute unambiguously imposed *their* particular standard(s). There is no way that can be the case.

To begin, petitioner and the Government *themselves* cannot agree what standard the word "appropriate" supposedly conveys. According to petitioner, an "appropriate education" is one that provides "substantially equal opportunit[y]," Pet. Br. 40-41—except a few months back, it meant an education that provides a "substantial educational benefit," Pet. 24. According to the Government, it is one that enables "significant progress," U.S. Br. 17—though in August, it meant one that was "meaningful in light of the child's potential," U.S. Cert. Br. 14. Three *amici* States disagree, saying that *they* are "on notice" that the word "appropriate" simply requires a "meaningful educational benefit." Del., Mass. & N.M. *Amicus* Br. 3-4; *see* Pet. 10-11 (describing circuits that also adopt a "meaningful benefit requirement"). And, of course, all of these readings differ from this Court's interpretation in *Rowley* that "an 'appropriate education' is provided when personalized educational services are provided," 458 U.S. at 197—although three Justices in dissent were sure "appropriate" actually meant "*full* educational opportunity," *id.* at 213 (White, J., dissenting, joined by Brennan and Marshall, JJ.). Five proponents, seven

opinions: This does not sound like a word that is "unambiguous."

All of this confusion stems, perhaps, from the fact that petitioner and the Government are more or less making up their standards from whole cloth. Petitioner tries to link his proposed standard to one of the Act's *findings*, which says that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity * * * for individuals with disabilities." 20 U.S.C. § 1400(c)(1). But as this Court held in *Pennhurst*, a statute's "general statement of 'findings'" is "too thin a reed" to be a source of "rights and obligations." 451 U.S. at 19. And in any event, this particular finding is several steps removed from the standard petitioner proposes: It says that "improving educational results" is an "*element*" of a "*policy*" of "ensuring equality of opportunity." 20 U.S.C. § 1400(c)(1) (emphases added). A State would hardly be on "clear notice" that this phrase imposes a legally enforceable obligation to provide substantially equal educational opportunity.

The Government's brief is even more brazen. It does not pretend that its "significant educational progress" standard appears in the Act. Rather, it seems to have derived that standard by taking the words "meaningful" "access" from *Rowley* and swapping in very rough synonyms. U.S. Br. 14-15 & n.4. In addition to being entirely unmoored from the text of the *statute*, this approach is irreconcilable with *Rowley*, *see supra* pp. 21-22, and this Court's subsequent explanation that "meaningful access" does not require any particular "level of education." *Cedar Rapids*, 526 U.S. at 79; *see also id.* at 73 ("As a general matter, services that enable a disabled child

to remain in school during the day provide the student with 'the meaningful access to education that Congress envisioned.' "). It is also telling that, by all appearances, the agency "responsible for the administration of the Act" has never before adopted this reading, or attempted to cut off IDEA funds on the ground that a State failed to comply with it. *Pennhurst*, 451 U.S. at 23-25.

Petitioner (at 41-43) and the Government (at 18-24) argue that their standards draw support from the Act's structure and purposes. As discussed below, they do not. *See infra* pp. 38-51. In any event, absent an unambiguous text, the Act's broader structure and purpose cannot provide the clear notice *Pennhurst* requires. *See Rowley*, 458 U.S. at 190 n.11 (stating that searching for the meaning of "an 'appropriate education' * * * 'in the purpose of the statute' " is "contrary to the fundamental proposition that Congress" must impose spending conditions "unambiguously"). Indeed, the Court has repeatedly disapproved of reading statutes—and particularly Spending Clause statutes—to impose substantive obligations that take their content mainly from the enactment's broad purposes. *See Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002) ("[A] recipient [of federal funds] may be held liable * * * for intentional conduct that violates the clear terms of the relevant statute, but not for its failure to comply with vague language describing the objectives of the statute." (citation omitted)); *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) (stating that courts may not read a statute to establish remedies because they are ostensibly "necessary to make effective the congressional purpose" (internal quotation marks omitted)).

In sum, the Act provides no clue of the "substantially equal educational opportunity" or "significant educational progress" standards petitioner and the Government propose. And the triple bank-shot they need to prevail—ignore the statutory definitions, assert that "appropriate" is unambiguous, and assign it a meaning that lacks any textual mooring—confirms that no reasonable state official would be on "clear notice" of the obligations they ask this Court to impose.

C. The "Some Educational Benefit" Standard Flows From The IDEA's Text, Structure, And Purpose

The "some educational benefit" standard, by contrast, has a firm textual footing and coheres with the statute's structure and purpose. Petitioner and the Government object that this standard cannot achieve all of the statute's aims on its own, but that argument ignores the rest of the Act's comprehensive scheme, which helps ensure that children with disabilities will receive a high-quality education.

1. The textual source of the "some educational benefit" standard is clear. The Act says that a FAPE consists of "special education and related services," 20 U.S.C. § 1401(9), which it defines as "specially designed instruction * * * to meet the unique needs of a child with a disability" along with such "supportive services * * * as may be required to assist a child * * * *to benefit* from" that instruction, *id.* § 1401(26), (29) (emphasis added). Any state official reading this language would understand that it requires States to provide personalized instruction and services designed to enable children "to benefit from" that instruction. *Id.* § 1401(26); *see Rowley*, 458 U.S. at

189, 200-201, 203, 206-207. "Noticeably absent from th[is] language *** is any substantive standard prescribing the *level* of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189 (emphasis added). All that it requires—putting aside for the moment the Act's many other obligations—is that an IEP be reasonably calculated to confer "some educational benefit." *Id.* at 200-201.

The statute also makes clear that that "benefit" cannot be trivial. "[A]ll enactments" are adopted against the background legal principle "*de minimis non curat lex* ('the law cares not for trifles')." *Wis. Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231-232 (1992). Any reasonable official reading the Act would therefore recognize that she must aim to provide a benefit that is "more than *de minimis*." Pet. App. 16a.

2. The "some educational benefit" standard is also consistent with the Act's structure and purpose. The IDEA is a comprehensive and extraordinarily detailed regulatory statute. To advance its broad purpose of "ensur[ing] that all children with disabilities have available to them a free appropriate public education," 20 U.S.C. § 1400(d)(1)(A), the Act sets 25 conditions on federal funding that span 59 pages and fill thousands of words of the U.S. Code. These provisions establish two principal mechanisms for ensuring that children with disabilities receive a high-quality education: (a) exacting *procedures* that IEP Teams must follow in developing an individual child's IEP and (b) *systemic requirements* that educational agencies must implement on a state-wide basis. These are the means Congress chose to achieve its ambitious goals. It is unnecessary, and improper, to infer an atextual substantive standard

above "some educational benefit" to try to advance them in a different way.

a. The Act's principal means of achieving its goals is its finely reticulated set of procedures for crafting an IEP. As *Rowley* explained, it was Congress's "conviction" that "adequate compliance with the[se] procedures * * * would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." 458 U.S. at 206.

To see why, just walk through the elaborate process that every school must follow when designing a child's IEP. At the start, the school must conduct a holistic evaluation of the child to determine the nature of his disability and his resulting needs. *See* 20 U.S.C. § 1414(a)-(c). With that evaluation in hand, the school must assemble an IEP Team composed of the child's parents, his teachers, and educational experts. *Id.* § 1414(d)(1)(B). Together, the team examines all relevant factors, including the results of the evaluation, the "strengths" and "needs" of the child, the "concerns of the parents," and, "in the case of a child whose behavior impedes the child's learning," "strategies" to "address that behavior." *Id.* § 1414(d)(3)(A)-(B).

Based on this analysis, the team writes the child's IEP. It must ensure the IEP satisfies a checklist of requirements. Most importantly, the IEP must address the child's present levels of performance, set forth his annual goals, and describe the specific services to be provided to him. *Id.* § 1414(d)(1)(A)(i). The IEP Team must also try, "[t]o the maximum extent appropriate," to ensure that the child is "educated with children who are not disabled." *Id.* § 1412(a)(5)(A).

And, following Congress's amendments in 1997 and 2004, the IEP Team must do still more. Those amendments made even more elaborate the process for developing an IEP. *See* IDEA Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 614(d)(1)(A), 111 Stat. 37, 83-85; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 614(d)(1)(A), 118 Stat. 2647, 2707-2709. Today, the IEP Team must think about the child both "academic[ally]" and "functional[ly]" in assessing his "present levels" of performance. 20 U.S.C. § 1414(d)(1)(A)(i)(I). It must focus on the "general education curriculum" and "each" of the child's "educational needs" in setting his annual goals. *Id.* § 1414(d)(1)(A)(i)(II). And it must keep in mind those goals, as well as that curriculum, in developing the child's special education and related services based on "peer-reviewed research to the extent practicable." *Id.* § 1414(d)(1)(A)(i)(IV). Once a child turns 16, the IEP Team must also devise "appropriate measurable postsecondary goals" and "transition services * * * needed to assist the child in reaching" them. *Id.* § 1414(d)(1)(A)(i)(VIII).

In construing these provisions, the Department of Education has imposed requirements even more specific. It has interpreted the words "general education curriculum" to mean that a child's annual goals "must be aligned with the State's academic content standards for the grade in which the child is enrolled." U.S. Dep't of Educ., Dear Colleague Letter 1 (Nov. 16, 2015);[3] *see* 34 C.F.R. § 300.320(a)(1)(i).

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[3] *Available at* https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.

Accordingly, state academic content standards "must guide" the IEP Team's "individualized decision-making" during the IEP process. Dear Colleague Letter, *supra*, at 4.

All together, then, the IEP process includes a wide array of elements to "assure" that an IEP contains "much if not all of what Congress wished in the way of substantive content." *Rowley*, 458 U.S. at 206. The process compels informed deliberation—ensuring that each IEP is developed only after thorough evaluation of the child, consideration of all relevant factors, and consultation with experts and interested stakeholders. The process "maximize[s] parental involvement," ensuring that a child's most devoted advocates are in the room when the IEP is crafted. *Id.* at 182 n.6. And through a checklist of requirements that both Congress and the Department have made longer and more detailed over the years, the process focuses the IEP Team on the considerations necessary to write an IEP that is personalized, holistic, and ambitious. Each element of this process is enforceable in court, 20 U.S.C. § 1415(f)(3)(E)(ii), and if a school materially violates the terms of the IEP that the process produces, parents may sue for specific performance or other remedies, *see Seth B. ex rel. Donald B.* v. *Orleans Parish Sch. Bd.*, 810 F.3d 961, 977-978 & n.67 (5th Cir. 2016).

These procedures do not, of course, demand any particular substantive outcome. But many statutes rely on a robust procedural framework to ensure good substantive results. The National Environmental Policy Act (NEPA), for example, requires agencies to closely evaluate significant regulatory actions, "consult" with interested stakeholders, and write a

"detailed statement" describing the expected environmental consequences of their decisions. 42 U.S.C. § 4332(C). Like the IEP process, this "hard look" process "does not mandate particular results." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). But as the Court has explained, it is "almost certain to affect [an] agency's substantive decision," and it is the sole means Congress prescribed to ensure that NEPA's "sweeping policy goals * * * are * * * realized." *Id.* Other statutes rely similarly on a rigorous process to achieve sound results. *See* 18 U.S.C. § 3553(a) (describing the factors a district court must consider in imposing a criminal sentence); *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 374-375 (1998) ("The Administrative Procedure Act * * * establishes a scheme of 'reasoned decisionmaking.' * * * Reasoned decisionmaking * * * promotes sound results * * * ."); *Little Bay Lobster Co.* v. *Evans*, 352 F.3d 462, 470 (1st Cir. 2003) ("[T]he [Regulatory Flexibility] Act creates procedural obligations to assure that the special concerns of small entities are given attention in the comment and analysis process * * * .").

The IDEA is no different. The IDEA sets up a process of reasoned decisionmaking, involving the right people with the right information and the right focus. And when a team of parents, teachers, and experts carries out that process in full—as every team must—it is highly likely to result in an IEP that "meet[s] [a child's] unique needs and prepare[s] [him] for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see also Forest Grove*, 557 U.S. at 247 ("[C]ourts should generally presume that public-school officials are properly performing their obligations under IDEA."). Even

the Government acknowledges as much; "[i]n most cases," it says (at 28), "schools and parents will reach consensus on an IEP that is reasonably calculated to help the child learn and succeed."

b. The Act reinforces those procedures with ambitious systemic requirements. One condition for receiving federal funds requires each State to set a "detailed timetable" for "providing full educational opportunity to all children with disabilities." 20 U.S.C. § 1412(a)(2). Another condition requires States to align their "goals for the performance of children with disabilities" with their goals for other children under the ESEA. *Id.* § 1412(a)(15)(A)(ii), (B). The Act also requires States to adopt a variety of policies concerning teacher qualifications, instructional materials, and other matters. *See id.* § 1412(a)(14), (23).

In 2004, Congress amended the Act to give these requirements teeth. Expressing serious "concern[] about the effectiveness of monitoring and enforcement" under the preexisting statute, it gave the Department of Education broad authority to ensure States' compliance with these conditions. H.R. Rep. No. 108-77, at 120 (2003); *see* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 616, 118 Stat. 2647, 2731-2737. The statute now provides that each State must submit a performance plan to the Department establishing "measurable and rigorous targets" for achieving the Act's goals, as well as annual performance reports tracking the State's progress. 20 U.S.C. § 1416(b)(2)(A), (C)(ii). The Department may disapprove a State's performance plan. *Id.* § 1416(c). And if the Department determines that a State is not "meet[ing] the [Act's] requirements and purposes,"

id. § 1416(d)(2)(A), it may implement an escalating series of enforcement measures, from imposing conditions on the State's use of federal funds to cutting off the State's IDEA funding in whole or in part, *id.* § 1416(e)(1)(B)-(C), (2)(B)(iii)-(v), (3)(B).

The Department has made ample use of this authority. In the last three years alone, it has found that Delaware, Texas, Nevada, and the District of Columbia were failing to meet the Act's requirements.[4] Because D.C. was deemed in noncompliance for several years, the Department directed it to reallocate a substantial portion of its federal funding to problem areas, submit a corrective action plan, and regularly report on its remedial efforts. *See* Letter from U.S. Dep't of Educ. to D.C. Superintendent of Educ. 8-9 (June 28, 2016). Other States promptly fixed their errors after the Department's notice—bearing out this Court's prediction, in a related context, that where the Secretary holds the authority to cut off federal funds, it is "doubt[ful] that the Secretary's notice to a State that its [implementation] scheme is inadequate will be ignored." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015).

In short, the "some educational benefit" standard must be viewed within the context of the entire Act, including its procedural and systemic requirements.

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[4] *See* Letter from U.S. Dep't of Educ. to D.C. Superintendent of Educ. (June 28, 2016); Letter from U.S. Dep't of Educ. to Nev. Dep't of Educ. (June 28, 2016); Letter from U.S. Dep't of Educ. to Tex. Educ. Agency (June 30, 2015); Letter from U.S. Dep't of Educ. to Del. Dep't of Educ. (June 23, 2014). These letters may be found at http://www2.ed.gov/fund/data/report/idea/partbspap/allyears.html.

Those elaborate and highly specific provisions refute the notion that Congress thought a greater substantive standard necessary to achieve its aims. Indeed, the structure of the Act suggests the opposite: that Congress did *not* intend to impose a greater substantive requirement. The evident care that Congress took in crafting and revising such a "comprehensive and reticulated statute" weighs heavily against adding requirements that Congress failed to "incorporate expressly." *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985) (internal quotation marks omitted); *see also Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2530 (2013) (similar). It would be strange indeed if Congress designed this comprehensive scheme only to leave implicit a substantive standard as significant as the standards proposed by petitioner and the Government. *See Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.").

3. Petitioner and the Government draw a different conclusion from this comprehensive statutory scheme. They argue that the thousands of words Congress wrote in the statute will amount to nothing unless this Court writes in a few more. But each of their arguments springs from the same fundamentally erroneous premise: that "some educational benefit" is the Act's *only* means of achieving its ends.

a. Petitioner and the Government contend that a child cannot receive a FAPE if "at the end of the day" schools have to provide children "only" a "barely more than trivial" educational benefit. Pet. Br. 23; *see* U.S. Br. 36. That assumes, though, that the Act's substantive requirement is its *only* requirement—

which it is not. As just explained, Congress also established "elaborate and robust" procedures for developing an IEP. U.S. Br. 19. And no one who actually goes through that extensive and rigorous process comes away thinking "it is perfectly fine to aim low." *Id.* at 36. Rather, the Act's procedural provisions require that an IEP be developed in a thoughtful and reasoned way—justifying Congress's "conviction" that "the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206.

Those provisions make clear, moreover, that the Government's parade of horribles is entirely illusory. The Government suggests that the "some educational benefit" standard would permit schools to satisfy the FAPE requirement even while providing a child specialized services (1) for only part of the school year, (2) to address only some of the needs arising from her disability, or (3) to help a child in only some of her classes. U.S. Br. 30-31; *see* Pet. Br. 17.

No. The procedural provisions of the statute plainly prohibit all of these things. A school cannot offer services for only part of the school year both because the obligation to provide services that enable a child "to benefit from special education" is continuous, and because terminating a child's services would require a determination that the child was no longer "disabled"—something that can normally be done only through the IEP process. *See Cedar Rapids*, 526 U.S. at 76-79 (concluding that the "related services" definition prohibits a school from providing "[i]ntermittent" services that do not permit a child "to remain in school" continuously); *see* 20 U.S.C. § 1414(b)(4), (c)(5)(A). A school cannot provide ser-

vices that address some but not all of a child's needs because the Act requires that an IEP be designed with the goal of addressing "*each* of the child's * * * educational needs that result from the child's disability." 20 U.S.C. § 1414(d)(1)(A)(i)(II)(bb) (emphasis added); *see also id.* §§ 1401(29), 1414(d)(1)(A)(i)(IV). A school cannot provide a child specialized services in some but not all of her classes because an IEP must have the goal of advancing a child in the "general education curriculum," and, to the extent possible, enable her to be "educated" in the school's "regular classes." *Id.* §§ 1414(d)(1)(A)(i)(II)(aa), 1412(a)(5)(A). Tellingly, the Government cannot identify a single court in three decades that has upheld any of these unlawful practices, even though the "some educational benefit" rule has prevailed in most of the country. That these imagined problems have never actually arisen shows there is no need to adopt the radical new rules petitioner and the Government propose.[5]

b. Petitioner (at 19-21, 35-40) and the Government (at 32-33) also contend that the "some educational benefit" standard is in tension with Congress's findings and purposes. They rely, in particular, on certain findings made by Congress in amending the Act after *Rowley*—among them, that "[i]mproving educational results for children with disabilities is an

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[5] Nor is it clear why the Government's standard would address the problems it imagines. By the Government's logic, a school could satisfy the FAPE standard by enabling a child to make "significant progress" in just the first two months (but not the remainder) of the school year, in just her reading skills (but not her communication skills), or in just her social studies class (but not her math and science classes). *See* U.S. Br. 30-31.

essential element of our national policy of ensuring equality of opportunity," that "the implementation of this [Act] has been impeded by low expectations," and that "the education of children with disabilities can be made more effective by * * * having high expectations for such children." 20 U.S.C. § 1400(c)(1), (c)(4), (c)(5).

These findings leave no doubt that Congress wanted to improve educational results and replace low expectations with high ones. But what is important is *how* Congress sought to achieve those goals. In amending the Act in 1997 and 2004, Congress did not alter the definition of a FAPE; indeed, in hundreds of pages of committee reports, the amendments' drafters did not once hint that they intended to revise the *Rowley* standard. Rather, Congress amended the Act by deepening the IEP-development process and strengthening the Act's systemic requirements. The 1997 Amendments, for example, required IEP Teams to place more "emphasis on [a child's] participation in the general education curriculum," S. Rep. No. 105-17, at 20 (1997), and States to include children with disabilities in state and district-wide assessment programs, *id.* at 21. The 2004 amendments required IEP Teams to "focus" on "measuring" a child's "academic achievement," H.R. Rep. No. 108-77, *supra*, at 108, and States to "align their accountability systems" with the No Child Left Behind Act, *id.* at 83. These were the means Congress chose to strengthen the Act. And if anything, the fact that the Act's procedures and systemic requirements have gotten *stronger* over the years only makes a searching substantive standard *less* necessary, not more so.

c. Finally, petitioner and the Government contend that the "some educational benefit" standard is "irreconcilable" with various IDEA provisions. Pet. Br. 21; *see* U.S. Br. 18-19. The Government, for instance, points (at 19) to the Act's procedures, arguing that Congress would not have made them so "elaborate and robust unless it intended to guarantee eligible children an opportunity to make significant educational progress." But the "legislative conviction" behind the Act was that a substantive guarantee of that kind would be unnecessary *precisely because* the procedures were so elaborate and robust. *Rowley*, 458 U.S. at 206. Petitioner and the Government might prefer a different statute, with a greater substantive component. But this Court does not superimpose substantive standards on top of "essentially procedural" requirements on the theory that the statute would work better that way. *Vt. Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 557-558 (1978).[6]

Petitioner (at 25) and the Government (at 20) also point to a State's obligation under the Act to "establish[] a goal of providing full educational opportunity to all children with disabilities." 20 U.S.C. § 1412(a)(2). But that systemic requirement existed at the time of *Rowley*, and the Court still rejected any substantive standard based on equality of opportunity. 458 U.S. at 180, 198-200. For good reason.

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[6] The Department of Education's regulations and interpretive guidance add nothing to the Government's argument. As explained above on pp. 40-41, the Department's Dear Colleague Letter merely fleshes out one of the requirements of the IEP process—namely, that an IEP Team must use the general education curriculum as a guide.

That provision in the Act concerns a state-wide "goal," not a substantive individual entitlement. What's more, the Act gives States leeway to accomplish the goal on their own "timetable." 20 U.S.C. § 1412(a)(2). It would surely "surpris[e]" the States if this provision were read to impose either petitioner's or the Government's substantive mandate. *Pennhurst*, 451 U.S. at 25.

Petitioner's (at 25-27) and the Government's (at 22-23) reliance on the ESEA is similarly misplaced. As amended by the No Child Left Behind Act of 2001, the ESEA establishes a system for holding schools accountable via student testing and performance. 20 U.S.C. § 6311. In 2004, Congress amended the IDEA to make children with disabilities part of this accountability system. *Id.* § 1412(a)(15)(A)(ii), (a)(16)(A). States must now set standards for, and assess, children with disabilities under the ESEA. But that, too, is a state-wide requirement, not a substantive individual entitlement. Moreover, the statute makes plain that the purpose of the assessments is to enable States to "assess progress" toward achieving ESEA goals, *id.* § 1412(a)(15)(B), and "measure the academic achievement of such children relative to" ESEA standards, *id.* § 6311(b)(2)(B)(vii)(II); *see* S. Rep. No. 108-185, at 17-18 (2003). Nothing in the Act suggests Congress intended to establish a sweeping, individual right to some level of achievement on those tests. The fact that Congress chose to strengthen a systemic requirement rather than alter the definition of a FAPE shows, once again, that Congress did not intend to adopt the standards petitioner and the Government propose.

* * *

To sum up: As *Rowley* rightly concluded, the IDEA's text straightforwardly imposes a "some educational benefit" requirement. But that is not the only requirement the Act contains. Its comprehensive and reticulated provisions help ensure that children will and do receive a high-quality education. There is no basis or need to second-guess Congress's design.

III. PETITIONER'S AND THE GOVERNMENT'S PROPOSED STANDARDS ARE UNWORKABLE

This Court should reject the standards proposed by petitioner and the Government for another reason: They are just as "unworkable" today as they were when this Court decided *Rowley*. 458 U.S. at 198. By contrast, more than three decades' experience has shown the "some educational benefit" standard to be readily administrable, and thus worthy of this Court's continued adherence.

1. a. For a standard to be workable in practice, it must "not [be] so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing* v. *Freestone*, 520 U.S. 329, 340-341 (1997). It must not thrust courts into areas of policy in which they lack "specialized knowledge and experience." *Rowley*, 458 U.S. at 208 (internal quotation marks omitted). And it must not "impose upon parties a confusing and onerous legal regime." *Winkelman*, 550 U.S. at 532. In each of these respects, petitioner's and the Government's proposed standards are a problem.

First, both standards lie beyond the competence of judges to administer. Would an IEP provide a level of educational opportunity "substantially equal" to

that provided other children? A "myriad of factors * * * might affect [a child's] ability to assimilate information presented in the classroom." *Rowley*, 458 U.S. at 198. Under petitioner's standard, a court would have to isolate the influence of each factor, and measure the educational opportunity provided by the IEP alone. The court would then have to do the same for "children *without* disabilities," Pet. Br. 30 (emphasis added), measuring what part of *their* progress is due to the opportunities provided by the school, as opposed to other factors. And even if a court could do all that, it would still have to compare the opportunity afforded by the IEP with the opportunities afforded other children, to determine whether they were "substantially equal." As *Rowley* recognized in rejecting such a standard, these are "impossible measurements and comparisons." 458 U.S. at 198.

The measurements required under the Government's test are tremendously difficult, too. How is a court to decide whether the progress promised by an IEP is "significant"? Sometimes, the Government says, "significant" means "master[ing] grade-level content"; other times, though, it does not. U.S. Br. 10. All the Government can say for sure is that schools should "enable eligible children to make progress that is *appropriate* in light of their own particular needs and capabilities." *Id.* (emphasis added). But telling courts that an "appropriate" education means a "significant" one, which in turn means an "appropriate" one, hardly helps them draw a principled line.

Second, both petitioner's and the Government's standards would embroil courts in educational policy disputes best resolved by others. As this Court has

said, education is an area of "intractable economic, social, and even philosophical problems" in which the Court lacks "specialized knowledge and experience." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 42 (1973) (internal quotation marks omitted); *see also Rowley*, 458 U.S. at 208. Yet, both petitioner and the Government would require courts to evaluate the *level of education* an IEP is designed to provide—either to assess whether it would be substantially equivalent to that afforded other children, or to assess whether it would reflect significant progress for that particular child. And a court cannot evaluate the level of education an IEP would provide without judging the *quality* of the educational methods and services promised: How good are the child's teachers? How effective are their teaching methods—and would a novel method proposed by the parents be better? What difference would smaller class sizes make? Would limited dollars be better spent elsewhere? These "persistent and difficult questions of educational policy" are precisely the questions *Rowley* warned courts should avoid. 458 U.S. at 208 (internal quotation marks omitted); *see also id.* at 207 n.29.

Third, both petitioner's and the Government's standards would generate profound uncertainty about what a child is owed under the statute. Petitioner says that an IEP should provide educational opportunity substantially equal to that provided children without disabilities, but *which* children without disabilities? Those in the same school? The same district? The same State? Petitioner sought certiorari on the ground that "the educational benefit" to which a child is "entitled" should not "depend on the state in which he or she lives." Pet. 15. But

depending on the applicable baseline, a child's entitlement could vary not just from State to State, but from district to district, or even from school to school. Children who might be entitled to certain services in one school (or district or State) might not be entitled to them in another, given disparities in educational opportunities across schools (and districts and States).[7] That would leave parents with little way of knowing the extent of their child's rights, making it difficult "to calculate the risk of unilateral action if they believe their child is not benefitting from his or her education." Pet. 16. And school districts would face a very difficult task in allocating their limited resources by trying to predict what hearing officers and courts would do in the face of such an ambiguous standard.

Given the difficulty of predicting what level of progress a decision-maker might regard as "significant," children, parents, and schools would face uncertainty under the Government's standard, too. Either standard would make figuring out what a child deserves "confusing and onerous." *Winkelman*, 550 U.S. at 532. And the result may well be more—and more complex—disputes between parents and schools, shifting limited resources away from educational services and toward litigation.

b. This case illustrates the problems with the other side's approaches. Indeed, it is telling that neither

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[7] If the baseline were instead an average of the opportunities provided children without disabilities *nationwide*, petitioner's standard would create the following anomaly: Children with disabilities would be entitled to *greater* opportunities than children without disabilities in some schools, and *lesser* opportunities in others.

petitioner nor the Government makes any effort to apply their proposed standards to the record here. The true test of workability, though, is whether their standards can provide a clear answer to the following question: What *should* petitioner's fifth-grade IEP have said?

Throughout this litigation, petitioner has complained about the "lack of progress" he made in the Douglas County public schools. Pet. App. 15a. But changing the goals and objectives in his IEP would not have helped him to progress. If, for example, petitioner was having difficulty learning how to "count money up to $5.00," Supp. J.A. 134sa, setting a new objective of counting money up to $100.00 would accomplish nothing. If petitioner's complaint is that he was not making progress, then the issue lies not with the written objectives, but with what his IEP would have done to help him achieve those objectives.

What help, then, did petitioner's fifth-grade IEP propose? It specified that each week, petitioner would receive 35 hours of "instruction from a special education teacher and support from a paraeducator," one hour of "speech/language intervention," a half hour of "mental health support," and a half hour of "occupational therapy"—for a total of 37 hours of special-education services. *Id.* at 142sa. The IEP also stated that petitioner would spend more than 60 percent of his time in a "[s]ignificant support needs classroom" instead of a general classroom. *Id.* at 142sa-143sa.

Under petitioner's test, a court would have to decide whether those services would be enough to provide petitioner an educational opportunity sub-

stantially equal to that provided children without disabilities. At the very outset, though, that task is made impossible by the fact that the record is completely silent on the level of educational opportunity provided other children, anywhere. A court would thus lack the necessary baseline against which to compare the educational opportunity provided in the IEP.

Even if there were a discernible baseline, a court would face another problem still: articulating why the IEP did (or did not) measure up. Should the school be faulted for not embracing a particular educational method—like "applied behavior analysis"? Pet. Br. 10. For not hiring teachers who "specialize[] in the education of children with autism"? J.A. 9. For maintaining a "student to teacher ratio" of greater than "1:1"? Pet. App. 70a. For maintaining class sizes of more than "eight" students? *Id.* Or for allowing petitioner to "engage with non-disabled children" for too much of the day? *Id.* These are "persistent and difficult questions of educational policy," which divide conscientious parents and experts. *Rowley*, 458 U.S. at 208 (internal quotation marks omitted). And yet, under petitioner's test, a court with no expertise would have to answer them—explaining which things are necessary, and which are not, for petitioner to be afforded an educational opportunity substantially equal to that of other children.

A court would face similar questions under the Government's test. If petitioner's IEP was deficient, what should it have included to provide petitioner an opportunity for significant progress? Additional hours with a special-education instructor? Less time in the general classroom? A commitment to apply

"applied behavior analysis"? As above, these are policy questions better resolved by "state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* at 207. But under the Government's test, a court lacking any specialized knowledge would have to resolve them.

c. Against all this, petitioner contends that "[t]he 'substantially equal opportunity' test simply describes the level of education *schools* must strive to deliver." Pet. Br. 49 (emphasis added). But petitioner's test purports to describe the content of a substantive right that is ultimately enforceable in court. *See* 20 U.S.C. § 1415(f)(3)(E), (i)(2). And under the Act, courts must make "independent decision[s] based on a preponderance of the evidence." *Rowley*, 458 U.S. at 205 (quoting S. Rep. No. 94-455, at 50 (1975) (Conf. Rep.)); *see* 20 U.S.C. § 1415(i)(2)(C). To be sure, administrative findings are entitled to "due weight." *Rowley*, 458 U.S. at 206. But under that "modified de novo standard of review," Pet. App. 6a, courts would still have to "determine independently how much weight" is due. *Ashland Sch. Dist.* v. *Parents of Student E.H.*, 587 F.3d 1175, 1182 (9th Cir. 2009). And a court could not evaluate the "persuasiveness of an administrative finding" under petitioner's test, *M.H.* v. *N.Y. City Dep't of Educ.*, 685 F.3d 217, 244 (2d Cir. 2012), without grappling with difficult questions of educational policy. Petitioner's suggestion (at 49) that, instead of a modified de novo standard, courts may apply "whatever other standard is most fitting" is just another bid to overrule *Rowley*.

Petitioner also contends (at 43-44) that his proposed rule is "eminently workable" because "with the right help," children with disabilities *can* succeed

academically. The question, though, is whether courts are capable of determining what the right help is, without engaging in "impossible measurements and comparisons," *Rowley*, 458 U.S. at 198, involving matters of "educational policy," *id.* at 206. What makes petitioner's standard "entirely unworkable" is the capacity of *courts*—not that of *children*. *Id.* at 198.

For its part, the Government contends (at 25-26) that its standard is "flexible and individualized," resulting in "different IEPs for different children with different capabilities." Of course, the fact that the Government's standard *is* individualized does not make it any easier for courts to administer. And the Government gives no reason to believe that, in applying its standard, courts will be capable of determining which children are entitled to which IEPs.

2. The only workable standard is the one that has been on the books for decades: An IEP must be reasonably calculated to confer "some educational benefit" upon a child with a disability. *Rowley*, 458 U.S. at 200.

This standard is readily administrable. An IEP must include "a statement of the special education and related services" that the school will provide. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). And schools must provide "periodic reports on the progress the child is making." *Id.* § 1414(d)(1)(A)(i)(III). When, as is often the case, a proposed IEP is modeled on a prior one, a court can look at the reports developed under the prior IEP to determine whether the child made progress. If the child made progress, and if the proposed IEP promises similar services, the court

may well conclude that the proposed IEP is reasonably calculated to confer some educational benefit. *See* Pet. App. 21a, 40a-41a.

Of course, there will be borderline cases, just as there are under any standard. Courts must discern the difference between *some* benefit and a benefit that is merely *de minimis*. And they must tailor their analysis to the individualized circumstances of each case, recognizing that what may be remarkable progress for one student may be only *de minimis* for another. *See Rowley*, 458 U.S. at 202. But those are commonsense judgments that judges can make—and have made for decades—without delving into tough questions of educational policy. The Court should not impose a different standard now.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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